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September 20, 2002

NEPA TASK FORCE
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Delivered as follows:
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Re: Request for Public Comment – NEPA Process

Dear NEPA Task Force:

Associated Logging Contractors, Inc. (“ALC”) submits these comments in response to CEQ’s Notice and Request for Comments published in the Federal Register on July 9, 2002. ALC is a non-profit corporation organized under the laws of the State of Idaho. With approximately 400 members and 80 associated members, we represent the independent timber association businesses and interests here in Idaho. Our members are family run businesses of log haulers, truckers, road builders, loggers and sawyers. Our members live and work in all areas of Idaho and we work on jobs located on private lands and public lands managed by the US Forest Service, Bureau of Land Management, State of Idaho and other public interests.

ALC and its membership have participated in numerous NEPA processes over the last two decades, primarily involving US Forest Service land management plans, travel plans and individual timber sales. We have participated in comment periods, public meetings, negotiation sessions, political proceedings, administrative appeals and litigation wherein the NEPA process and the CEQ regulations, as interpreted or applied by various governmental agencies, have been attacked or defended by ALC. It is an understatement to say that the national forest system and agency is “grid locked” to such a degree that absolutely no progress or decisions can be made in a timely and efficient manner, and that such “grid lock” can be directly linked to the current NEPA process.

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ALC appreciates this opportunity provided by the National Environmental Policy Act (NEPA) Task Force to respond to its mandate to seek ways to improve and modernize NEPA analyses and documentation. We submit that the only way to improve and modernize this process is by simplification. A significant percentage – if not most – of the NEPA lawsuits have been based on alleged violations of CEQ's regulations. The CEQ regulations have presented abundant opportunities for lawsuits because they established numerous litigation targets – elaborate procedures (e.g., multiple public comment opportunities); requirements for additional documentation (e.g., Environmental Assessments (EAs) and Findings of No Significant Impacts (FONSIs)); and expansive but vague analytical requirements (e.g., the content, and geographical and temporal scope, of analyses of cumulative impacts, connected actions and indirect effects). When the CEQ has attempted to reduce complexities or ambiguities arising from case law or its own regulations, it typically has done so through guidance documents. These documents, however, lack the force and effect of law and have been virtually ignored by the courts.

Recommendations:

Suggestions for Programmatic EISs:

- At a minimum, programmatic EISs should be prepared only on those programs which the courts recognize as Federal actions subject to judicial review. CEQ should excuse from NEPA “programmatic” documentation pre-decisional planning or other documents that cover such broad geographical areas and so many unknown projects as to be unsuitable or poorly suitable to NEPA-related environmental analysis.

Suggestions for Tiering:

- CEQ should insist that the programmatic NEPA document be considered timely for tiering purposes for a significant period after its completion. At a minimum, CEQ should establish a strong presumption of timeliness, with a heavy burden of proof to show that a programmatic NEPA document is too outdated to permit tiering.
- As applied to forest land management, tiering has contributed to the abundance of administrative and judicial challenges seeking to halt projects permanently or delay projects until they are no longer of any value. Increasingly, the EIS is prohibitively costly to prepare, can take years to prepare, and in many cases does not withstand judicial scrutiny. CEQ has only provided very vague and open-ended analytical requirements in rules and guidance, leaving it up to judicial interpretation on a case by case basis with no consistent results, other than delay and the termination of the proposed project.
- CEQ should consider eliminating the required analyses of “connected actions” and “cumulative effects.”
- The CEQ should also address the geographical scope of the effects analysis in NEPA documents.

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Environmental Assessments:

We question whether NEPA requires the preparation of EAs. We recognize that a mechanism must be in place to determine whether an agency action is a "major Federal action – significantly affecting the quality of the human environment" and thus requires preparation of the EIS under NEPA § 102(2)(C). At most, that mechanism could be a FONSI that looks solely at the impacts of the proposed agency action, and not to alternatives to the action.

If CEQ determines that EAs should be maintained as a NEPA compliance tool, then the following are recommended:

- New simplified requirements for the contents of project EAs should be developed by CEQ to ensure that EAs are not, as they now are, "detailed statements" which are required only for EISs on major Federal actions under § 102(2)(C).
- CEQ should develop new requirements for EAs that differ fundamentally in organization and contents from the requirements for EISs (rather than simply repeat the requirements of an EIS for an EA qualified only by the increasingly meaningless wording "brief discussions of," 40 C.F.R. § 1501.4(b).
- Rules and guidance should contain explicit statements that certain analyses are appropriate only for EISs and are not to be conducted for or include in EAs.

EAs have been subjected to more than just excessive paperwork; they also have become immersed in excessive procedures. We question whether any public comment is required for EAs, particularly when it is not required for EISs by NEPA or for EAs by CEQ's rules. Indeed, CEQ's regulations simply direct the agency proposing the action to include the public "to the extent practicable" during EA preparation 40 C.F.R. § 1051.4(b).

- CEQ should provide rules and guidance that EAs need only be made available to the public.
- CEQ also should set criteria for the "convincing statement of reasons" why no EIS is required that the Ninth Circuit requires of a FONSI. The present CEQ guidance – "briefly describing the reasons why an action ... will not have a significant effect on the human environment and for which an [EIS] will not be prepared" – is apparently insufficient for at least some courts. 40 C.F.R. § 1508.13.
- CEQ should provide complete direction on the full contents of FONSI.

Time Limits:

* CEQ should provide rules and guidance to set general time limits for NEPA document preparation either by category of document (e.g., programmatic EIS, project EIS, programmatic EA, project EA, tiered EA, etc.) or by type of action.

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Emergencies:

- CEQ should develop a better process of determining when circumstances are “emergencies” and selecting the “alternative arrangements” for NEPA compliance for the responsive Federal actions 40 C.F.R. §1506.11. The present emergency provision of the CEQ regulations is so unwieldy as to be virtually useless – every decision under it is made individually and with no guiding criteria or templates.
- CEQ’s emergency provision should be broadened to include any circumstances where delay would result in failure to respond in a timely manner to adverse environmental consequences resulting from fire, windstorm, disease or insect infestations or other natural causes.

Categorical Exclusions:

- Some type of administrative review or appeal process needs to be developed for the selection of a categorical exclusion by an agency. Currently, challenges are brought directly in federal court without any opportunity for the agency and the litigants to sort out the issues or controversy through an administrative process. At the same time, we support the reduction or elimination of numerous levels of appeals and the simplification of the entire process as it applies to categorical exclusions.
- CEQ should consider developing a set of criteria – a checklist that is not subjective – for agencies to determine whether an action or class of actions is eligible for categorical exclusion.

New Information – Supplemental Documents:

The continuing duty to supplement environmental documents for “new information” both during and after the original NEPA process slows the process and disrupts implementation of approved actions.

After an EIS is complete, the CEQ regulations require a supplement to the EIS when there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. The courts have held that there is a “continuing” duty to respond to new information to determine if a supplemental EIS is required.

Supplementation has also been extended to EAs even though there is no regulatory requirement for such supplementation. Even though supplemental EAs are not specifically required by the regulations, agencies have prepared supplements to EAs. Because EAs are not required by the statute and EA supplements are not required by the regulations, it makes sense to clarify that there is no requirement for a supplemental EA.

- CEQ should tighten the definition of “new information” that requires a supplemental EIS, and define the circumstances when an ongoing project or program must be halted until a supplemental EIS is completed.
- The CEQ Regulations should be amended to simplify the process for agencies to decide whether to prepare a supplemental EIS for an ongoing project or program. The regulations should establish a clear standard or threshold for new information so that agencies are not continually forced to consume time and resources reviewing unreliable or unimportant information, and so the legal system is not used by special interest groups to delay projects or programs to force an agency to do so.

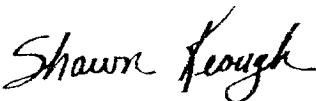
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- The American Forest and Paper Association has submitted comments to the NEPA Task Force with some very specific recommendations about how to modify CEQ regulations regarding the EIS. ALC concurs with these recommendations and recites them as follows. The CEQ regulations should require an agency to prepare a supplemental EIS on a project or program only if the agency makes three findings:
 1. the new information presents clear evidence that the project or program is likely to have material more harmful effects on the environment than disclosed in the original EIS for the project or program;
 2. the agency lacks the authority to modify the project or program to substantially mitigate for the newly-disclosed effects unless it prepares a supplemental EIS; and
 3. the value of the supplemental EIS is likely to exceed the cost of preparing the document.
- The regulations should provide that when an agency decides a supplemental EIS should be prepared on an ongoing project or program, the agency must halt an activity that is part of the project or program until the supplemental EIS is completed only if the agency finds:
 1. the activity is likely to cause serious and irreparable environmental harm before the supplemental EIS is completed; and
 2. it would be more cost effective to mitigate any such harm through other means. The regulations should provide that only specific activities meeting these two criteria should be halted, and other ongoing portions of a project or program may continue at the discretion of the agency.

ALC appreciates this opportunity to improve the NEPA process through your Task Force. We have taken the time to study the comments submitted by citizens and other interested organizations as you have made this information available to the public through your web site. ALC specifically concurs in the comments submitted to the NEPA Task Force from the National Ski Area Association on July 31, 2002, and from the law firm of Moore, Smith, Buxton and Turcke on August 23, 2002, as well as the American Forest and Paper Association.

Sincerely,

ASSOCIATED LOGGING
CONTRACTORS, INC.

By: 

SHAWN KEOUGH, Executive Director